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Tribal Sovereignty in the Age of Terror:

Moving Beyond *Duro v. Reina*

*Stephan M. Fellows**

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INTRODUCTION

The terrorist attacks of September 11, 2001 heralded the beginning of a new age for the United States: an age of terror. They also awakened the nation to the vulnerabilities of a free and open society, by placing a spotlight on the fragmented and decentralized nature of the nation’s homeland security. Reacting to this problem, Congress soon took steps to centralize and coordinate efforts to secure the nation from further threats. These efforts have included the coordination of federal activities with state and local governments as well as direct assistance to the states.¹

The provision of direct assistance to the states recognizes the unique role of states in our federal system. Since state and local emergency personnel are far more likely to be first responders in the event of a terrorist attack, they are the logical focus of efforts to organize a cohesive and coherent force for combating and responding to terrorist threats. In addition, state and local personnel are more likely to be aware of the unique security needs of the local

¹ One law designed to strengthen state and local terrorism readiness is the Homeland Security Act of 2002. *See* 6 U.S.C. § 361.

population. For this reason it is unfortunate that Congress has not fully recognized the needs of tribal governments or the unique role that they play in securing the nation from external threats.²

One of the most important roles that tribal governments can provide in the war on terror is in the provision of law enforcement personnel within the territories under their jurisdiction.³ Unfortunately, tribal authority to police tribal lands has been steadily eroded over the years until it has reached a point where authorities are nearly impotent to enforce their own laws let alone assist the federal government in the enforcement of its laws.⁴ The low point for tribal criminal law enforcement followed the decision of the Supreme Court in *Duro v. Reina*.⁵ There the Court held that tribal sovereignty did not include the power to arrest and try nonmember Indians that have committed a crime within tribal jurisdiction.⁶ Congress reacted to this decision by enacting the so-called “Duro-fix” which restored tribal authority to prosecute nonmember Indians who violate applicable tribal criminal code.⁷

² See Courtney A. Stouff, Comment, *Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty*, 108 PENN. ST. L. REV. 375 (2003) (noting that the Homeland Security Act of 2002 treats tribes as local governments and thus places their funding at the mercy of potentially uncooperative state governments).

³ Senator Inouye, commenting on proposed Senate Bill 578, noted that tribal governments currently have jurisdiction over approximately 260 miles of international borderland and hundreds of miles more in international water borders and that frequently tribal law enforcement officers are the only security forces available in the area. See 107 CONG. REC. S3372 (daily ed. Mar. 7, 2003) (statement of Senator Inouye).

⁴ See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that past Congressional actions impliedly divested tribes of jurisdiction over non-Indian criminal defendants); *Montana v. United States*, 450 U.S. 544 (1980) (holding that allotment of lands divested tribe of sovereignty over hunting and fishing by non-Indians on such lands).

⁵ 495 U.S. 676 (1990).

⁶ See *Duro v. Reina*, 495 U.S. 676 (1990). A nonmember Indian is an Indian who is a citizen of a tribal nation, but who is not a citizen of the tribe which is attempting to exercise jurisdiction over him or her. See *id.* at 679.

⁷ The “Duro-fix” constitutes amendments to the Indian Civil Rights Act which are codified at 25 U.S.C. §§ 1301(2), 1301(4).

The *Duro* opinion and the subsequent “Duro-fix” highlight the precarious position that tribal governments occupy under the federalism imposed upon them by the United States. It also raised some troubling questions concerning the long-settled plenary power of Congress over tribal relations.⁸ Namely, does Congress’ plenary power permit it to restore sovereignty to a tribal government or is tribal sovereignty permanently lost once explicitly or implicitly divested by Congress. Of course this begs the question as to whether Congress has in fact taken sovereignty away from the tribes, as was held in *Duro*,⁹ and also whether sovereignty is something which is truly capable of being taken away. Nevertheless, soon after *Duro* and the “Duro-fix”, the circuit courts were confronted with the issue of whether or not Congress’ amendments were a restoration of sovereign power such that tribal prosecution and federal prosecution fit under the doctrine of dual-sovereignty or whether the restoration was a delegation of federal authority with double jeopardy implications.¹⁰

The circuit courts were soon split with regards to whether the “Duro-fix” was a restoration of inherent sovereignty or whether it was a delegation by Congress.¹¹ This split was finally brought to the fore by *United States v. Lara*,¹² and perhaps because of this prominent split, the Supreme Court has granted a writ of certiorari in this case to determine the issue.¹³ The

⁸ For a discussion of the plenary power, see, *infra* Section I.

⁹ See *Duro*, 495 U.S. at 693 (The Court held that tribal sovereignty over nonmember Indians was implicitly divested by Congressional action. This was the case because “[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.”).

¹⁰ See Section II.

¹¹ See *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), *overruled in part* by *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001); *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998).

¹² 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 46 (2003).

¹³ See *United States v. Lara*, 124 S. Ct. 46 (2003).

result will have grave implications for the ability of Congress to fully restore tribal authority to police the territories under their authority and to assist the federal government in securing the United States from terrorist threats. If the Supreme Court holds that Congress is incapable of restoring tribal authority based upon the tribe's inherent sovereignty, Congress will have lost a valuable ally in the war on terror. If the Court holds in favor of the restoration of inherent sovereignty, then Congress may some day choose to go beyond fixing *Duro v. Reina*¹⁴ and restore the tribes to their full sovereign right to police their territories.

In this comment I argue that Congress has the power to unfetter the tribal government's right to regulate and police its own territory without a delegation of Congressional sovereignty. Specifically, this comment argues that: 1) Congress does not have the power to create or destroy sovereignty but only the power to recognize or not recognize existing tribal sovereignty and 2) even if sovereignty is capable of divestiture, the Court's decision in *Duro* was merely an exercise of the Court's power to declare the federal common law, which does not in and of itself divest a tribe of sovereignty. Since Congress is the sole branch with the power to regulate the relations of the United States with respect to tribes, Congress can correct the Supreme Court's federal common law decisions affecting tribes that are inconsistent with its views.

Section I describes the development of tribal sovereignty and Congress' plenary power to deal with tribes. Section II examines the development of the split in the Eighth and Ninth Circuit Courts. Finally, this comment analyzes the arguments presented by the various Circuit Court opinions addressing the interplay of *Duro* and the "Duro-fix" and concludes that the historically

¹⁴ 495 U.S. 676 (1990).

and logically supported argument is that Congress is able to restore tribal sovereignty to its original status without delegating federal sovereignty.

I. THE ORIGINS AND NATURE OF MODERN TRIBAL SOVEREIGNTY

The early relations between the American Colonies and the Native American tribes were bi-lateral in nature.¹⁵ The colonists traded, negotiated, allied and occasionally warred with their neighboring tribes.¹⁶ Although many European settlers did not equate tribes as sovereign states in the European sense, they nearly uniformly recognized that the tribes were sovereign peoples capable of entering into binding treaties.¹⁷

The importance of this sovereign to sovereign contact is evidenced by the numerous treaties entered into between the tribes, England and the colonies.¹⁸ Tribes were powerful neighbors and the protection afforded by allying with them and the wealth that could be obtained by trading with them, was routinely noted in these treaties.¹⁹ After the Revolutionary War, the

¹⁵ See e.g., The 1788 Treaty of Fort Pitt with the Delaware Nation. See also Katherine Hermes, “Justice Will Be Done Us”: Algonquian Demands for Reciprocity in the Courts of European Settlers, in THE MANY LEGALITIES OF EARLY AMERICA 123 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) (describing the complex relations between the Algonquian’s and their European neighbors. The author notes that “as a result of contact, a set of indigenous legal rules emerged, especially with regard to personal and subject matter jurisdiction, interpretation, and final resolution of conflict.” *Id.* at 126.

¹⁶ See Francis Jennings, The Ambiguous Iroquois Empire; Felix S. Cohen, Handbook of Federal Indian Law 416-419 (1942 Ed.) (describing the New York Indians and their early relations with the colonies).

¹⁷ See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 55-60 (4th ed. 1998) (noting the early practice of making treaties with tribes) [hereinafter *Getches*].

¹⁸ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 58 (1831) (Thompson J., dissenting) (referring to the “innumerable treaties” formed with tribal nations.).

¹⁹ See *Getches*, *supra* note 17 at 57 (“Regardless of conflicting religious interpretations of Indian rights, when tribes were numerous and relatively powerful, European colonies and colonizing nations found it to their advantage and safety to seek Indian consent to settlement.”).

American States inherited the sovereign role of the English crown.²⁰ Under the Articles of Confederation, each state dealt with its own internal tribes on an individual basis in spite of Congressional authority to handle the nation's Indian affairs.²¹ Later, when the Constitution was drafted, the sovereign power to deal with tribes was specifically delegated to the federal government.²²

The delegation of the power to regulate commerce with the tribes found in Article I is one of only two clauses mentioning Indians within the Constitution.²³ It is because of this paucity of references within the Constitution itself and the peculiar nature of the placement of the delegation to Congress regarding tribal relations, that the nature of tribal sovereignty has been a point of contention from the earliest days of the United States. And from the beginning, it has fallen to the Supreme Court of the United States to define how the tribes fit within the federalist framework of the Constitution.

A. The Marshall Trilogy

The current status of tribal sovereignty is primarily derived from a triad of seminal Supreme Court opinions dating from early the nineteenth century. These opinions are often

²⁰ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584 (1823) ("By this treaty (ending the Revolutionary war), the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States.).

²¹ See ART. CONF. art. IX p. 4 (giving Congress the power to regulate the affairs with Indians not part of a State).

²² See U.S. CONST. art. I, § 8, cl. 3. The framers of the Constitution wanted to make it clear that Congress alone had the power to deal with the tribes. See JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 142 (Bicentennial Edition, Norton) (complaining that States had on numerous occasions engaged in war and made treaties with the tribes without Congressional permission). As a result of this, the power of Congress to regulate commerce was amended to include tribes and explicitly to include tribes within State borders. See *id.* at 509.

²³ See U.S. CONST. art. I, § 8, cl. 3 (the power to regulate commerce) & art. I, § 2, cl. 3 (excluding Indians not taxed from the calculation of representatives). The Fourteenth Amendment retained the 'Indians not taxed' language of Article I Section 2 when it abolished the three-fifths formula for slaves. See U.S. CONST. amend. XIV, § 2.

referred to as the “Marshall trilogy” after their author, Chief Justice Marshall. These cases serve as the starting point for any inquiry into the status of tribes within the Constitutional framework.

1. *Johnson v. M’Intosh*²⁴

The first of the Marshall triad, *Johnson v. M’Intosh*, ostensibly did not deal with sovereignty at all. The case was actually between two persons claiming title to the same land, originally held by native tribes.²⁵ The question of sovereignty arose because Johnson derived his title through a predecessor in title who purchased the land directly from the tribe in 1773 and 1775 whereas M’Intosh claimed his title through a sale by the United States government in 1818.²⁶ The United States had obtained sovereignty over the land after the end of the war with England but had not otherwise directly purchased or conquered the land in question.²⁷ The Court felt that the question could not be answered without first looking at the nature of the title held by the tribes and that this in turn was dependant upon the nature of the tribes’ sovereignty.²⁸

Chief Justice Marshall began the discussion by explicitly recognizing the European created doctrine of discovery, which stated that a discovering European power had title to all lands discovered as against all other European powers and that the tribes merely held a subordinate right of occupancy.²⁹ Essentially this meant that only the discovering European

²⁴ 21 U.S. (8 Wheat.) 543 (1823).

²⁵ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 571-72 (1823).

²⁶ See *Johnson*, 21 U.S. at 550-51, 555-56, 560.

²⁷ The land was originally claimed by Virginia but was passed to the federal government as part of a compromise. See *id.* at 559.

²⁸ See *id.* at 572.

²⁹ See *id.* at 572-73.

power could effectively divest the tribe of its lands.³⁰ Marshall further noted in his decision that tribes did not have full sovereignty but rather that “their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”³¹ Thus in an attempt to mediate a land dispute between two European peoples, the Court unilaterally relegated tribal sovereignty to something less than the full sovereignty of a European nation state.

In spite of this holding, the Court did recognize that the native tribes *were in fact sovereign*, albeit limited sovereigns. Interestingly, in a discussion of the nature of title held by a European purchaser from a tribe, the Court notes that such a purchaser “incorporates himself with them, so far as respects the property purchased; holds their title under their protection, *and subject to their laws*.”³² This is an explicit recognition that tribes have sovereignty over their lands and can even fashion their own laws to govern those lands. The Court goes on to state that this still does not save the purchaser of tribal title because it “derives its efficacy from their will” and the tribe is still free to annul the transfer.³³ And since the tribe ceded the land to the United

³⁰ The Court noted that the United States was the successor to England’s title to the discovered lands and that as such the United States had the “exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” *Id.* at 587.

³¹ *Id.* at 574.

³² *Johnson*, 21 U.S. at 593 (emphasis added). Thus Johnson’s sole recourse must be had through the tribal government since the transfer cannot “give a title which our Courts could distinguish from the title of [the] tribe, as it might still be conquered from, or ceded by [the] tribe.” *Id.*

³³ *Id.* at 594 (“These nations...had an unquestionable right to annul any grant they had made to American citizens.”).

States “without a reservation”, the United States is not bound to recognize any title derived from the tribe.³⁴

Johnson does not stand for the proposition that tribal governments cannot transfer good title to anyone. Rather *Johnson* stands for the proposition that the tribe can only create title recognizable under the tribe’s own laws. Thus the tribes do have title, but it is not the full title that a typical European state would have because the tribe cannot transfer the land to another sovereign, such that the transferee sovereign is now able to exert its sovereignty over the land. Only the discovering nation can obtain sovereign title to the land. This makes sense and is a practical solution to the problem of competing European states in a new world.

The doctrine of discovery makes it clear that only the discovering European power can ever extinguish tribal sovereignty over a land to which that European power holds discovery title. Thus when a state with discovery title purchases land from a tribe, the land is not only transferred to the discovery state, but also the exclusive power to exercise sovereignty over that land (unless some portion of sovereignty is reserved by the tribe). This reduces the competition and concomitant international conflicts that would be precipitated by a race to be the first to conquer or purchase sovereign title from the tribal governments. It also discourages and protects the European power from encroachments by the other European states.

Since the tribal transfer to *Johnson* cannot cause a transfer of sovereignty to the United States, *Johnson*’s title will have no efficacy in the United States. *Johnson*’s title is subject to tribal sovereignty and he stands in the shoes of a tribal citizen. As such when the tribe later

³⁴ *Id.* (“Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity.”).

ceded the land to another sovereign in the treaty of Greenville, his title had only as much validity as the tribe bargained for in the treaty. Unfortunately for Johnson, the tribe did not reserve any rights for persons holding title under its authority.³⁵

Thus *Johnson* established that tribes are sovereign, but that their inherent sovereignty is diminished by the European doctrine of discovery. This diminishment in sovereignty is manifested as an inability to transfer sovereign title to their lands except to a nation holding discovery title.³⁶ It is the first in a long and sometimes tragic line of unilateral Court imposed diminishments of tribal sovereignty.

2. *Cherokee Nation v. Georgia*³⁷

Cherokee Nation, the next case in the Marshall triad, defined, in dicta and without a clear majority, the place held by tribes within the framework of the Constitution. The case was brought by the Cherokee Nation, who requested an injunction against the application of laws passed by Georgia that attempted to exert state authority over Cherokee lands and extinguish their tribal government.³⁸ Because the case was brought to the Supreme Court under its grant of original jurisdiction, it became necessary for the Court to address the nature of tribal

³⁵ The result would have been the same if the Johnson had purchased land in Germany and that land was subsequently transferred to Poland by a treaty that did not reserve rights for German title holders. If Poland then granted Johnson's land to a Polish citizen, Johnson would have no claim against Poland, his sole complaint would be with Germany. An example of just such a reservation of rights can be found in the 1848 Treaty of Guadalupe Hidalgo, wherein Mexico ceded almost half its territory to the United States. In that treaty, the Mexican government had reserved property rights to the Mexican citizens holding title to lands in the ceded territory. See Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M.L. REV. 201 (1996) (noting the divergent ways in which treaties of conquest have been treated by the Court).

³⁶ See *Johnson*, 21 U.S. at 572-73.

³⁷ 30 U.S. (5 Pet.) 1 (1831).

³⁸ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

governments and determine whether they qualified as foreign states under the Constitution.³⁹ The court held that jurisdiction was lacking because the tribe was not deemed to be a foreign state within the meaning of Article III of the Constitution.⁴⁰ Despite the lack of jurisdiction and the fact that there was no majority rationale, the remarks of the Chief Justice have had a profound impact on Indian law and tribal sovereignty.

To answer the question of whether tribes qualify as foreign states, Marshall analyzed the nature of tribal sovereignty and the relation of the tribes to the United States. He noted that the Cherokees have been “uniformly treated as a state from the settlement of our country” and that the tribe was “a distinct political society, separated from others, capable of managing its own affairs and governing itself.”⁴¹ He furthered noted that tribes in general have the unquestioned “right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government” but he felt that these facts do not necessarily imply that tribes are foreign states within the meaning of the Constitution.⁴² Instead he concluded that the nature of tribal sovereignty, in the diminished sense articulated in *Johnson v. McIntosh*,⁴³ was such that tribes might more accurately be deemed “domestic dependant nations” and he characterized their

³⁹ See *Cherokee Nation*, 30 U.S. at 15.

⁴⁰ See *id.* at 20.

⁴¹ *Id.* at 16.

⁴² *Id.* at 17. See also Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113, 141-42 (2002) (arguing that Native Tribal relations to the United States were more like that which European feudal states bore to their protecting allies).

⁴³ See discussion, *supra*, at I. A. 1.

relationship to the United States as that of “a ward to his guardian.”⁴⁴ As such, the tribe was a sovereign state, but not a foreign state within the meaning of the Constitution.⁴⁵

Two other Justices concurred in the dismissal but would have held that tribes possessed no sovereignty at all.⁴⁶ In his concurrence, Justice Johnson stated that the tribes were “a people so low in grade of organized society” that they could not be considered sovereign at all.⁴⁷ In spite of this, he still noted that it was within the purview of the executive to recognize the sovereignty of those tribes that had become sufficiently civilized.⁴⁸ Johnson concurred because the executive had not yet recognized any tribe to be sovereign such that it qualified as a foreign state under the Constitution.⁴⁹

Justice Marshall concluded that tribes were sovereign, but that they have a diminished form of sovereignty that places them under the protection of the United States. Alternatively, Justice Johnson does not see them as sovereign at all, but believes that they may become sovereign by becoming civilized and that this status is conferred when the executive branch expresses recognition of the tribe.⁵⁰ As time passed, Justice Marshall’s view of tribes as

⁴⁴ *Cherokee Nation*, 30 U.S. at 17.

⁴⁵ *See id.* at 18. The Chief Justice also found support for his belief that the founders did not consider tribes to be foreign states by reference to the commerce clause which appeared to contradistinguish tribes from foreign nations. *See id.*

⁴⁶ *Id.* at 20-50 (Johnson, J., & Baldwin, J., concurring).

⁴⁷ *Id.* at 21 (Johnson, J., concurring).

⁴⁸ *Id.* at 21-22 (Johnson, J., concurring) (noting that until the executive recognizes the tribe as a state “we cannot recognize it as an existing state, under any other character than that which it has maintained hitherto as one of the Indian tribes or nations.”).

⁴⁹ Justice Johnson dismisses the evidence that the executive has long treated tribes as sovereigns by noting the apparently one-sided nature of the Treaty of Hopewell. *See Cherokee Nation*, 30 U.S. at 22-23 (Johnson, J., concurring). Justice Thompson finds this reasoning illogical stating that “Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state.” *See id.* at 53 (Thompson, J., dissenting).

⁵⁰ *Id.* at 21-22 (Johnson, J., concurring).

domestic dependant nations would become the prevailing view. Ironically, although Marshall's opinion may have been an attempt to generate some form of legal protection for tribal sovereignty, it has had the effect of permitting later courts to steadily erode the boundaries of tribal sovereignty by virtue of the tribes "domestic dependant nation" status and the "guardian-ward" relationship.

3. *Worcester v. Georgia*⁵¹

The final case of the Marshall triad definitively establishes the nature of the relationship between the tribes, the states and the federal government. The case presented an issue of whether or not Georgia could exercise jurisdiction over the Cherokee nation and specifically over a citizen of Vermont who was preaching the gospel under a federal license to the Cherokee in violation of Georgia law.⁵² Although one year earlier Justice Marshall had denied that the Cherokee were a foreign state with standing to sue in the Supreme Court, here he eloquently defended the exclusive sovereignty of tribal nations and asserted that the Constitution vested the exclusive right to deal with the tribes in the federal government.⁵³

The Chief Justice explained that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."⁵⁴ The fact that the Cherokee have sought the protection of the United States in the Treaty of Hopewell does not deprive the tribe of

⁵¹ 31 U.S. (6 Pet.) 515 (1832).

⁵² See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 537-38 (1832).

⁵³ See *Worcester*, 31 U.S. at 561 ("The whole intercourse between the United States and this (Cherokee) nation, is, by our constitution and laws, vested in the government of the United States.").

⁵⁴ *Id.* at 559.

its sovereignty.⁵⁵ He justified by stating, in language similar to that of Justice Thompson's dissent in *Cherokee Nation*, "[a] weak state, in order to provide for its safety may place itself under the protection of a more powerful, without stripping itself of the right of government, and ceasing to be a state."⁵⁶ Furthermore, he noted that Congress had been granted the "powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*" and that this was sufficient to "comprehend all that is required for the regulation of our intercourse with the Indians."⁵⁷ And since Congress has recognized the Cherokee nation through its treaty making power, the Cherokee nation's sovereign power is the exclusive sovereign power within the territory so recognized and therefore "the laws of Georgia can have no force...but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."⁵⁸

Worcester was the most forceful articulation of Justice Marshall's belief that tribes were sovereign nations that had the exclusive right to govern their own destinies. But he also seemed to recognize the precarious nature of their ability to exercise their sovereignty under pressure from white settlers and the various state governments. Marshall attempted to deal with this by placing tribes within the Constitutional framework in such a way that the individual states would have no independent authority to act against the tribes.⁵⁹ Unfortunately, to accomplish this he

⁵⁵ See *id.* at 551 (noting that the tribal signatories did not understand the nuances of the language employed in the treaty of Hopewell).

⁵⁶ *Id.* at 561. See also, *supra* note 49.

⁵⁷ *Id.* at 559.

⁵⁸ *Id.* at 561. With this language, the Court seems to recognize that Congress has the power to recognize a foreign sovereign and that this recognition is binding upon the states.

⁵⁹ He did this by interpreting the Constitution to vest the federal government with the plenary power to deal with tribal nations. *Worcester*, 31 U.S. at 559. He described the powers of treaty making and war as sufficient to

felt compelled to define them as dependant sovereigns under the tutelage of the Federal government.

4. *Dependant Sovereignty*

The Marshall triad recognized tribal sovereignty, but relegated it to a status somewhat less than that of a traditional European state and subjecting it to Congressional interference. *Johnson* began the diminishment of tribal sovereignty by adopting the doctrine of discovery as the law of the land and thus limiting the tribes' ability to alienate land. *Cherokee Nation* followed by defining tribes as domestic dependant nations under the guardianship of Congress. Finally, although *Worcester* affirmed the sovereignty of tribes over the lands that they still held, it created the foundation for what would later become Congress' plenary power over the tribes by asserting that Congress alone has the sole and plenary power to deal with tribes under the Constitution.

B. Tribal Sovereignty and Congressional Plenary Power

Justice Marshall successfully placed the sole power to deal with the tribes in the hands of the federal government. However, he also defined the tribes as dependants in a trust relationship with the federal government. This plenary power to deal with tribal governments was interpreted by subsequent Courts as an affirmative grant of near limitless Congressional power over tribal nations. The decision in *Lone Wolf*⁶⁰ epitomizes this later trend.

“comprehend all that is required for the regulation of our intercourse with the Indian.” *Id.* Marshall also stated that these powers were “not limited by any restrictions on their free actions.” *Id.*

⁶⁰ 187 U.S. 553 (1903).

1. *Finding the Plenary Power: From Crow Dog to Lone Wolf*

In *Ex Parte Crow Dog*⁶¹ the Court addressed whether a tribal citizen within the Dakota Territory could be charged with murder under a federal statute applying to persons who commit murder within lands under the exclusive jurisdiction of the United States.⁶² The case hinged upon the interpretation of a treaty and its impact upon a statute which would otherwise prevent the application of the statute to tribal members.⁶³ The Court decided that the federal statute did not apply to tribal citizens.⁶⁴ The Court reasoned that subjecting tribes to the laws of an alien people should be avoided and that tribal sovereignty should be respected.⁶⁵ To that end, the Court stated that if a law is to apply to tribal members, there must be a “clear expression of the intention of Congress” that the law should so apply.⁶⁶

Congress responded to the decision in *Crow Dog* by enacting the Major Crimes Act⁶⁷ which granted federal courts the power to exercise jurisdiction over tribal members who commit certain specified crimes in Indian Territory. When the Major Crimes Act was passed, it was still not clear that Congress had the power to take jurisdiction over crimes committed by tribal citizens. This question was addressed by the Court in *United States v. Kagama*.⁶⁸

⁶¹ 109 U.S. 556 (1883).

⁶² See *Ex Parte Crow Dog*, 109 U.S. 556, 557-58 (1883).

⁶³ See *Crow Dog*, 109 U.S. at 562-71.

⁶⁴ See *id.* at 572.

⁶⁵ See *id.* at 571 (“It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code.”). Ironically, later Courts would use this same logic to deprive tribes of their sovereignty. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁶⁶ *Crow Dog*, 109 U.S. at 572.

⁶⁷ See 18 U.S.C. § 1153 (year).

⁶⁸ 118 U.S. 375 (1886).

In *Kagama* two tribal members challenged Congress' power to enact the Major Crimes Act.⁶⁹ The Court upheld Congress authority stating that “[i]t seems to us that this is within the competency of Congress.”⁷⁰ The Court reasoned that this was the case, not because Congress had been granted such a power under the Constitution, but rather because of the circumstances of native tribes and their relationship to the United States.⁷¹ The Court stated that tribes were “within the geographical limits of the United States” and the tribes “within these limits are under the political control of the Government of the United States, or of the States of the Union.”⁷² The Court further stated that because the tribes were weakened from dealings with the federal government, they had become “wards of the nation” and that they are now dependant upon the largess of the United States.⁷³ The Court finally concluded that tribal dependence brought about

⁶⁹ See *United States v. Kagama*, 118 U.S. 375, 375-76 (1886).

⁷⁰ *Kagama*, 118 U.S. at 383.

⁷¹ See *id.* at 384-85 (“The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographic limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”).

⁷² *Id.* at 379. The Court also erroneously stated that there were only two types of sovereignties within the territories of the United States: the federal government and the States. Thus it appears that the Court mistakenly equated geographical sovereignty as to foreign European states (i.e. discovery sovereignty) with exclusive sovereignty over the same territory. This departs from the doctrine enunciated by Marshall in *Worcester* that the tribes retained exclusive sovereignty, subject to the limits imposed by the discovery doctrine alone, over their lands. See *supra* note 30 and accompanying text. The correct exposition of Congressional power would have been to state that Congress must first extinguish the tribe’s sovereignty through purchase or conquest before it can exercise direct jurisdiction over tribal lands. The Court seems to operate under an assumption, demonstrated by the language employed to grant Congress the power to legislate the Major Crimes Act, that tribal have already been divested through purchase or conquest in one fashion or another.

⁷³ *Id.* at 383-84.

by the guardian-ward relationship effectively conveyed the power to legislate over the tribes to Congress.⁷⁴

By virtue of *Kagama*, the dependant-ward relationship first articulated in *Cherokee Nation* and the limitations on tribal sovereignty found in *Johnson v. McIntosh*, Congress' authority to deal with the tribes had blossomed into a Congressional power to unilaterally alter the relationship between the United States and the tribes through legislation alone. The full extent of this power and the implications for tribal sovereignty would not become fully clear until *Lone Wolf v. Hitchcock*,⁷⁵ where the Court clarified that tribal sovereignty was now completely placed within the hands of Congress.

In *Lone Wolf v. Hitchcock* tribal citizens complained that United States treaty commissioners had divested the tribe of its lands in contravention of a prior treaty agreement that required the signature of three-fourths of all adult male tribal citizens.⁷⁶ The Court held that Congress had “[p]lenary authority over the tribal relations...from the beginning” and that the “power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”⁷⁷ The Court noted that this plenary power included the power to abrogate treaty provisions, “though presumably only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the

⁷⁴ See *id.* at 384 (“From their weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, their arises the duty of protection, and with it the power.”).

⁷⁵ 187 U.S. 553 (1903).

⁷⁶ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903).

⁷⁷ *Lone Wolf*, 187 U.S. at 565.

interest of the...Indians that it should do so.”⁷⁸ The Court also stated that “the judiciary cannot question or inquire into the motives which prompted the enactment of” the legislation which acted in contravention of the treaty.⁷⁹ Indeed the Court not only stated that it could not inquire into the motives of Congress but created a presumption that “Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.”⁸⁰ With this the Court placed tribal sovereignty blindly in the hands of Congress and disavowed itself of any responsibility to review Congress’ decisions.⁸¹

2. Historical Limits on the Plenary Power: Reserved Rights, the Canons of Construction and Fiduciary Duties

Although the Supreme Court has interpreted the Constitution and federal common law as vesting a plenary power to deal with native tribes in the Congress of the United States, it has also

⁷⁸ *Id.* at 566.

⁷⁹ *Id.* at 568.

⁸⁰ *Id.*

⁸¹ Although the historical basis for the plenary doctrine has been questioned, see generally Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113 (2002) (arguing that the plenary power is not based on any textual source but rather upon a racist colonial policy), the recognition of a plenary power in Congress makes sense if one views tribes as separate sovereign foreign nations. The Constitution clearly recognizes the national government as the sole arbiter of relations between the United States and foreign nations (*See generally*, U.S. CONST. art. I, § 8, cl. 1 (provide for common defense), cl. 3 (regulate commerce with foreign Nations), cl. 4 (naturalization), cl. 10 (piracies and punish offenses against the law of nations), cl. 11 (war powers), and art I., § 10, cl. 1 (prohibiting states from entering into treaties)) and the Court has long recognized its inability to pass judgment on the foreign policy judgments of Congress or the Executive *See generally*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13 (3rd ed. 2000) (describing the political question doctrine and its historical application in cases of foreign policy). It is entirely within the purview of Congressional authority to wage war, recognize foreign governments, make treaties, abrogate treaties and otherwise regulate the relations of the nation with other countries. However, at least since the decisions found in the Marshall trilogy, tribal nations have been semi-incorporated into the federal structure of the United States and should, at a minimum, be entitled to protections similar to the respect afforded the divisions of power between the states and the federal government. Until recently, the canons of construction and the reserved rights doctrine served this function. *See, infra*, Section I. B. 2.

recognized some limits on the exercise of this power. The limitations imposed upon Congress take the form of three major canons of construction used to interpret treaties with tribes, a rule of statutory interpretation, a doctrine of reserved rights, and a limited form of fiduciary duty arising out of the trust relationship created by the guardian-ward line of cases. Until the advent of the Rehnquist Court, these safeguards served to maintain a degree of tribal sovereignty that permitted tribal governments to govern the affairs of their people without being inadvertently subsumed by Congressional or state action.⁸²

The starting point for analysis of legal questions involving tribal sovereignty will often begin with a close reading of the treaty or treaties between the tribe and the United States.⁸³ Because of the disparity in their respective bargaining positions, the Court has fashioned three canons for construing treaties between the United States and native tribes.⁸⁴ The first canon of construction requires that treaties be read according to the understanding that the tribal members would have had.⁸⁵ The second is that ambiguous terms within the treaty must be construed in favor of the tribe.⁸⁶ Finally, treaties should be liberally construed in favor of the tribes.⁸⁷

⁸² See *infra*, note 99 and accompanying text.

⁸³ See *e.g.*, *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173-74 (1973) (“The beginning of our analysis must be with the treaty...”).

⁸⁴ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1984) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (internal citations omitted)).

⁸⁵ See *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

⁸⁶ See *Oneida*, 470 U.S. at 247.

⁸⁷ See *id.*

In addition to the judicial requirements regarding the interpretation of treaties, the Court in *United States v. Winans*⁸⁸ recognized reserved rights for tribal nations who entered into treaties with the United States. *Winans* involved an action by the United States on behalf of the Yakima nation to enjoin activities by Winans and other non-Indians which obstructed the tribe's off reservation fishing rights.⁸⁹ The tribe had negotiated a treaty which ceded lands to the United States but reserved the exclusive right to fish on the reservation and a retained right to fish off the reservation "at all usual and accustomed places, in common with citizens of the Territory."⁹⁰ The issues were whether the treaty reserved off-reservation rights to tribal citizens and whether subsequent creation of a state and the granting of the non-reservation land to private citizens altered the tribe's treaty rights.

The respondents argued that the language of the clause reserving off-reservation fishing rights should only be interpreted to grant tribal members the same rights as ordinary citizens and that even if that language were construed to grant additional rights, the subsequent admission of the territory as a state extinguished the tribe's special privileges.⁹¹ The Court rejected the first argument as being inconsistent with how the tribal negotiators would have viewed the treaty.⁹² The Court further held that the treaty was not a grant of rights to the Indians, but rather "a grant

⁸⁸ 198 U.S. 371 (1905).

⁸⁹ *See United States v. Winans*, 198 U.S. 371, 382 (1905) (noting that although the non-Indians should not be limited in their use of new technology, "it does not follow that they may construct a device which gives them exclusive possession of the fishing places.").

⁹⁰ *Winans*, 198 U.S. at 378.

⁹¹ *See id.* at 382-83.

⁹² *See id.* at 380 (characterizing this result as "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.").

of rights from them” and a “reservation of those not granted.”⁹³ To the Court “[n]o other conclusion would give effect to the treaty.”⁹⁴ The Court also rejected the respondents’ second argument, stating that rights reserved by treaty are unaffected by the later creation of a state as it “was surely within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed.”⁹⁵ The Court concluded by holding that the ceded lands were burdened by an easement in favor of the tribal members to enable them to exercise their fishing rights.⁹⁶

Winans established two important treaty principles which shape the nature of tribal sovereignty. First, treaties are a grant of rights from the tribes to the federal government and that those rights not granted to the federal government are reserved to the tribe. Second, reserved rights cannot be abridged or abrogated by states. The *Winans* rule, along with the canons serve to protect tribes from all encroachments on their sovereignty which are not explicitly intended by Congress. This principal is also furthered by a rule of statutory interpretation that protects treaty rights from inadvertent abrogation through statutes of general application.⁹⁷ Finally, the Court has moved away from the absolute nature of Congress’ plenary power. Instead of absolute

⁹³ *Id.* at 381.

⁹⁴ *Id.*

⁹⁵ *Id.* at 384.

⁹⁶ *See Winans*, 198 U.S. at 384.

⁹⁷ *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (“We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists ‘the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.’” (citations omitted)). *See also Oneida*, 470 U.S. at 247-48 (noting that Congressional intent must be plain and unambiguous).

authority to act in any way it deems fit, Congressional action must be rationally tied to the fulfillment of its trust obligations.⁹⁸

C. Modern Tribal Sovereignty

The trend in modern tribal sovereignty has been one of judicially sanctioned encroachments upon tribal sovereignty. This has been in spite of the continuing Congressional policy of encouraging tribal self-rule and independence and is often at direct odds with some members of the Court's philosophy of restrained jurisprudence.⁹⁹ The Court decisions of *McClanahan v. Arizona State Tax Commission*,¹⁰⁰ *Oliphant v. Suquamish Indian Tribe*¹⁰¹ and *Montana v. United States*¹⁰² signaled a shift in Court policy from requiring explicit Congressional action to generate changes in the relationships between the States, the Federal government and the tribes to a policy where the Court judicially modifies these relationships to meet its own policy objectives.

⁹⁸ See *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

⁹⁹ See Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 205-235 (2002) (devoting an entire section to the development of a judicially activist approach to tribal plenary power by a judicially conservative Court). See also L. Scott Gould, *Symposium: The Role of Jurisdiction in the Quest for Sovereignty: Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 673 (2003) [hereinafter *Gould*] (arguing that current Court doctrine is based on a fixation with expanding the powers of the states and that tribal sovereignty can only be protected by insulating tribes from judicial scrutiny); Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75 (2003) (characterizing the Court's activist intervention in the erosion of tribal sovereignty as the result of them vs. us mentality in resolving sovereignty disputes); Bryan H. Wildenthal, *Symposium: Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113 (2002) [hereinafter *Wildenthal*] (examining how the *Lone Wolf* mentality of the Rehnquist Court has eroded tribal sovereignty); Alex Tallchief Skibine, *Symposium: Sixth Annual Tribal Sovereignty Symposium: Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 348 (2001) (noting that at the same time that Congress chose to encourage tribal self rule, the Supreme Court switched from protecting tribal sovereignty to restricting tribal sovereignty).

¹⁰⁰ 411 U.S. 164 (1973).

¹⁰¹ 435 U.S. 191 (1978).

¹⁰² 450 U.S. 544 (1980).

1. *McClanahan*: Sovereignty as ‘Backdrop’

Although *Oliphant* and *Montana* are the bases from which virtually all modern attacks on tribal sovereignty originate, these cases are the natural outgrowth of the minimization of tribal sovereignty found in *McClanahan*. In *McClanahan* the Court was confronted with the question of whether Arizona’s income tax applied to a tribal member whose income was derived solely from within tribal territory.¹⁰³ To resolve this issue the Court needed to address the impact of tribal sovereignty on Arizona’s power to tax tribal members.¹⁰⁴

The Court in *McClanahan* recognized the inherent right of tribes to govern itself, but it rejected the notion that this inherent sovereignty by itself could bar state jurisdiction.¹⁰⁵ The Court stated that “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”¹⁰⁶ However, the Court goes on to explain that this does not mean that sovereignty should be disregarded altogether, but rather that it “is relevant...not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.”¹⁰⁷ As such the Court shifts its reliance from the nature of the tribe’s sovereignty to the statutes and treaties that define the relationship between the United States and the tribes. If these

¹⁰³ See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165-66 (1973).

¹⁰⁴ See *McClanahan*, 411 U.S. at 168-69 (starting the analysis with a survey of cases dealing with tribal sovereignty).

¹⁰⁵ See *id.* at 172.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* The Court justified this striking modification of precedent by stating that “modern cases...avoid reliance on platonic notions of Indian sovereignty and...look instead to the applicable treaties and statutes which define the limits of state power.” *Id.*

items, the Court holds, in light of the *backdrop* of tribal sovereignty, indicate that the states attempted regulation has been foreclosed, then the state will not have jurisdiction.¹⁰⁸

In the end the Court held that Arizona has no jurisdiction to tax the tribal member because the “activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.”¹⁰⁹ Unfortunately, the victory is a pyrrhic one, for now the Court has articulated a rule which has shifted from absolute immunity while sovereignty remains to one of pre-emption based upon a reading of statutes and treaties with sovereignty serving as one factor in interpreting these documents. Thus the stage was set for *Oliphant* and *Montana* to further erode tribal sovereignty.

2. *Oliphant: Unspoken Assumptions, Dependant Status and the Demise of Tribal Sovereignty*

In *Oliphant* two non-Indian residents on tribal lands were arrested by tribal authorities for various offenses.¹¹⁰ The non-Indians contested their arrest on grounds that the tribal governments lacked jurisdiction to try non-Indians.¹¹¹ The Court held that the tribal government lacked jurisdiction over non-Indians, even though the non-Indians were resided within the geographic limits of the tribal territory and even though they committed crimes on the tribe’s territory and against the tribe’s property.¹¹² The reason, the Court stated, was that after analyzing

¹⁰⁸ See *Id.* at 172-73.

¹⁰⁹ See *McClanahan*, 411 U.S. at 179-80.

¹¹⁰ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

¹¹¹ See *Oliphant*, 435 U.S. at 195.

¹¹² See *id.* at 195.

the historical record it appeared to be an “unspoken assumption” that Congress as well as the other branches believed that tribes lacked the jurisdiction to try non-Indians.¹¹³

Relying on this “unspoken assumption” the Court stated that “[w]hile Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our *implicit conclusion of nearly a century ago* that Congress consistently believed this to be the necessary result of its repeated legislative actions.”¹¹⁴ The Court completely ignores the requirements of precedent that any such divestiture be explicitly mandated by an act of Congress. Instead it now finds it sufficient to analyze historical documents (however selectively) to find an *implicit* divestiture of tribal sovereignty.¹¹⁵

In one fell swoop *Oliphant* deprived tribal governments of their sovereign power to regulate the criminal behavior of all non-Indians within their territory. The decision also started a full scale judicial assault against tribal sovereignty by diminishing the importance of the protections afforded to tribal sovereignty by the canons of construction and the reservation of powers doctrine expressed in *Winans*. This policy of judicially limiting tribal sovereignty has

¹¹³ *Id.* at 203.

¹¹⁴ *Id.* at 204 (emphasis added). Of course the Court comes to this conclusion through an analysis of historical records which he states must be “read in light of the common notions of the day and the assumptions of those who drafted them.” *Id.* at 206. In this way, the bigoted policies of the past are used to reshape and define the policies of the present.

¹¹⁵ Professor Wildenthal noted that this holding “reversed the historic presumption of *Worcester* and *Williams* that Indian sovereign powers survive until and unless expressly revoked by Congress.” See *Wildenthal*, *supra* note 99 at 126. Professor Wildenthal goes on to state that the Court based this upon historical findings supported by only one instance whereas “Rehnquist buried in a lengthy footnote a great deal of countervailing evidence, whose significance he distorted or disregarded.” *Id.*

taken several forms,¹¹⁶ but the most devastating has been the erosion of the tribal power to regulate the behavior of persons within tribal territory.

3. *Extending Oliphant: From Montana to Hicks*

Montana was the first case to extend the holding in *Oliphant*. The question in *Montana* was whether the tribe could civilly regulate non-Indians hunting and fishing on non-Indian fee land within the geographic limits of the tribe's territory.¹¹⁷ The Court adopted the principles articulated in *Oliphant* and extended them to the civil context holding that the status of Indian tribes was inconsistent with their ability to regulate non-Indians on fee lands held by non-Indians.¹¹⁸

To reach this conclusion the Court first analyzed the scope of the lands under the authority of the tribe.¹¹⁹ The Court noted that the tribe's reservation was ““set apart for the *absolute and undisturbed use and occupation* of the Indians herein named””¹²⁰ and held that this language gives the tribe the right to regulate non-Indian hunting and fishing on tribal lands.¹²¹ The Court then twists this language in on itself and reasoned that, since the treaty required undisturbed use and occupation, this power can only apply to lands which the tribe has lost

¹¹⁶ See Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113, 214-223 (2002) (stating that the judicial attack on tribal sovereignty was accomplished by: 1) diminishing the geographic reach of the tribes, 2) enlarging state authority, and 3) diminishing tribal authority.). If the Court continues on this path, tribes may soon be reduced to the status of glorified fraternal organizations.

¹¹⁷ See *Montana v. United States*, 450 U.S. 544, 547 (1980).

¹¹⁸ See *Montana*, 450 U.S. at 565.

¹¹⁹ See *id.* at 547-48.

¹²⁰ *Id.* at 558 (quoting the 1868 Fort Laramie Treaty) (emphasis in original).

¹²¹ See *id.* at 558-59.

absolute and undisturbed control over.¹²² Thus the loss of absolute and undisturbed use and occupation by the tribe also causes the loss of tribal authority to regulate the activities of non-Indians on the land even when the land is found within the tribe's territory.¹²³

The Court explained that inherent tribal authority could not bridge the gap created by non-Indian ownership of property located within tribal territory.¹²⁴ The Court specifically relied upon the holding in *Oliphant* by expanding it into a general principle which limited tribal authority over non-Indians.¹²⁵ The Court did, however, hold that there were exceptions to this general rule. The Court held that tribes could regulate nonmembers "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."¹²⁶ In addition, the Court held that the tribe retained regulatory authority over non-Indians on fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹²⁷ *Montana* extends the presumption of *Oliphant* that nonmembers are outside of the jurisdiction of tribes unless the nonmember's activities are on land that the tribe has the exclusive control over or the nonmember's activities fall within one of the exceptions. Although the exceptions may appear to have saved tribal sovereignty from complete dissolution, in

¹²² *See id.*

¹²³ *See id.* The Court has used this link to control of land to expand the areas under state authority and shrink the lands under tribal authority, even when those lands are clearly within the geographic limits of tribal territory. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that right-of-way granted to state highway department divested tribe of jurisdiction under the *Montana* rule. This in spite of clear statutory language indicating Congressional intent that right-of-ways remain Indian country. *See* 18 U.S.C. 1151 (2000)). *See also supra*, note 116.

¹²⁴ *See Montana*, 450 U.S. at 563.

¹²⁵ *See id.* at 565 ("the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

¹²⁶ *Id.* at 565.

¹²⁷ *Id.* at 566.

practice the exceptions have not prevented the gradual, case-by-case, curtailment of tribal jurisdiction.

The Court further extended both *Oliphant* and *Montana* in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.¹²⁸ In *Brendale* the Court addressed whether state or tribal zoning applied to lands within the tribal reservation where some of the lands were open to the public and some of the lands were closed.¹²⁹ Relying on *Montana* the plurality of the Court stated that the subsequent opening up of lands during the allotment period defeated the tribe's right to exclusively regulate the land in the open areas.¹³⁰ It further held that the *Montana* exceptions did not apply even though zoning has traditionally been regarded as a police power designed to protect the interests of the community and would seem to fall within the *Montana* exceptions.¹³¹

Finally, *Nevada v. Hicks*¹³² further extended *Oliphant* and *Montana* to such a point that it is highly unlikely that a tribe will ever be able to exercise jurisdiction over non-members even when those non-members are on tribal land.¹³³ The question presented was whether the tribe had jurisdiction to hear a complaint by a tribal member against non-Indian officers who entered onto tribal land and allegedly violated the complainant's civil rights.¹³⁴ A majority of the Court

¹²⁸ 492 U.S. 408 (1989).

¹²⁹ *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 414 (1989).

¹³⁰ *Brendale*, 492 U.S. at 422.

¹³¹ *Id.* at 429. The Court specifically stated that "a literal application of the second exception would make little sense." *Id.* *Brendale* is one of the cases which has since made it clear that the *Montana* exceptions are of little aid to tribes attempting to defend their sovereignty from judicial encroachments.

¹³² 533 U.S. 353 (2001).

¹³³ L. Scott Gould characterizes the *Hicks* decision as one dictated by the Court's new consent paradigm first articulated in *Montana*. See Gould, *supra* note 99.

¹³⁴ See *Nevada v. Hicks*, 533 U.S. 353, 355-57 (2001).

rejected the tribe's jurisdiction relying on *Oliphant* and *Montana*.¹³⁵ The Court stated that the general principle found in *Oliphant* that tribes have no power over nonmembers was not limited by the rule in *Montana*.¹³⁶ Instead the Court stated that *Montana* clarified that the "ownership status of land...is only one factor to consider in determining whether regulation of activities of nonmembers is necessary to protect tribal self-government or to control internal relations."¹³⁷ As a result, even tribal ownership of the land will not necessarily permit the tribe to exercise its jurisdiction over nonmembers.

Thus by the dawn of the new century, tribal sovereignty had been reduced from the nearly absolute power to regulate tribal lands and affairs held under the Marshall trilogy to a mere backdrop which may or may not shed light on statutes and treaties. Tribal governments had for all practical purposes lost the ability to regulate the conduct of nonmembers on tribal territory.

II. *DURO V. REINA* AND ITS AFTERMATH

*Duro v. Reina*¹³⁸ is a logical extension of the holding found in *Oliphant*. In *Oliphant* the Court held that, as was evidenced by 'unspoken assumptions', tribal governments had lost the sovereign power to try non-Indians for crimes committed within their territory.¹³⁹ *Duro* extended this same logic to tribal criminal jurisdiction over Indians who were not members of

¹³⁵ See *Hicks*, 533 U.S. at 364 ("We conclude today...that tribal authority to regulate state officers in executing process related to violation, off reservation, of state laws is not essential to tribal self-government.").

¹³⁶ See *Id.* at 359.

¹³⁷ *Id.* at 360.

¹³⁸ 495 U.S. 676 (1989).

¹³⁹ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 (1978).

the tribe attempting to assert jurisdiction.¹⁴⁰ Although the extension of *Oliphant* was not in itself surprising, the subsequent action by Congress to curtail the activism of the Court and correct the holding in *Duro* was somewhat of a surprise. It is this sequence of events that has led up to the controversy in *Lara* in which the fate of tribal sovereignty hangs in the balance.

A. *Duro v. Reina* and the “Duro-fix”

Albert Duro was an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians.¹⁴¹ In the summer of 1984 he was residing on the Salt River Indian Reservation with a friend and working for a tribal company.¹⁴² The Salt River Reservation is the territory held by the Salt River Pima-Maricopa Indian Tribe.¹⁴³ In June of 1984 he allegedly shot and killed a fourteen year old Indian boy from a different tribe.¹⁴⁴ As a result he was arrested by federal authorities and later handed over to tribal authorities who sought to try him for illegally firing a weapon on tribal lands.¹⁴⁵ Mr. Duro filed a writ of habeas corpus in the district court arguing that the tribe lacked jurisdiction to try him.¹⁴⁶ The District Court agreed and ordered him freed on grounds that the arrest was a violation of due process.¹⁴⁷ The Ninth Circuit took the appeal and after two opinions rejected the District Court’s reasoning and reversed.¹⁴⁸ The Ninth Circuit held that the language of the federal jurisdiction statute granted jurisdiction to tribes for minor

¹⁴⁰ See *Duro v. Reina*, 495 U.S. 676 (1989).

¹⁴¹ See *Duro*, 495 U.S. at 679.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 679-81.

¹⁴⁶ See *id.* at 681-82.

¹⁴⁷ See *Duro*, 495 U.S. at 682.

¹⁴⁸ See *id.* at 682-84.

crimes committed by any Indian even if a nonmember.¹⁴⁹ The Supreme Court granted certiorari to resolve a circuit split.¹⁵⁰

The Court began by asserting that “[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens.”¹⁵¹ But the Court quickly noted that *Oliphant* had changed that basic premise for tribes.¹⁵² The Court looked to its opinion in *United States v. Wheeler*¹⁵³ for the proposition that tribes could only regulate the conduct of their own members.¹⁵⁴ The Court was very concerned with *Duro*’s status noting that “[n]either he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority.”¹⁵⁵ This, the Court stated, placed *Duro* in the same situation as the non-Indian in *Oliphant* and that as a result the same protections should apply.¹⁵⁶ The Court also looked at the historical evidence and concluded that from a very early time in United States history, tribes had only had the ability to govern internal relations.¹⁵⁷ As such, the Court held that the tribe lacked the power to try a nonmember Indian.¹⁵⁸

In response to the decision in *Duro*, Congress amended the Indian Civil Rights Act (“ICRA”)¹⁵⁹ to specifically recognize the inherent power of tribal governments to exercise

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 684.

¹⁵¹ *Id.* at 685.

¹⁵² *See id.*

¹⁵³ 435 U.S. 313 (1978).

¹⁵⁴ *See Duro*, 495 U.S. at 685-86.

¹⁵⁵ *Id.* at 679.

¹⁵⁶ *See id.* at 688.

¹⁵⁷ *See id.* at 688-92.

¹⁵⁸ *See id.* at 698.

¹⁵⁹ *See* 25 U.S.C. § 1301 (2000)

criminal jurisdiction over all Indians.¹⁶⁰ Congress also revised the definition of Indians to ensure that all Indians were covered under the tribal jurisdiction regardless of the status of the individual Indian with respect to the tribe attempting to assert jurisdiction.¹⁶¹ These changes to the ICRA are often referred to as the “Duro-fix”.

B. The Nature of Tribal Sovereignty after *Duro v. Reina*

The “Duro-fix” restored to the tribes the power to criminally prosecute nonmember Indians but it created serious concerns regarding the ability of Congress to restore tribal sovereignty. The first concern revolved around the nature of inherent tribal sovereignty itself and whether it could be lost and then later restored such that it remained inherent. The next concern was whether a Supreme Court pronouncement on the nature of tribal sovereignty was constitutional in nature, thus leaving final say to the Court, or whether it was based on federal common law which Congress has the power to modify. The Eighth and Ninth Circuits addressed these issues in a series of opinions which culminated in the grant of a writ of certiorari for *United States v. Lara*.¹⁶²

1. The “Duro-fix” in the Ninth Circuit: *Means v. Northern Cheyenne Tribal Court & United States v. Enas*

In *Means v. Northern Cheyenne Tribal Court*,¹⁶³ Means was arrested by tribal authorities for sexual assault.¹⁶⁴ Means was living on Northern Cheyenne territory but was a member of the

¹⁶⁰ See 25 U.S.C. § 1301(2) (2000).

¹⁶¹ See 25 U.S.C. § 1301(4) (2000).

¹⁶² 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 46 (2003).

¹⁶³ 154 F.3d 941 (1998).

Sisseton-Wapatan Tribe and therefore was considered a nonmember Indian under the rule stated in *Duro*.¹⁶⁵ Means appealed his arrest through the tribal courts claiming that the Northern Cheyenne had no jurisdiction under the *Duro* rule.¹⁶⁶ After the Northern Cheyenne courts affirmed the jurisdiction of the tribe, Means brought an action in district court which was treated as a writ of habeas corpus.¹⁶⁷ The District Court denied relief and the case was appealed to the Ninth Circuit.¹⁶⁸ Because the alleged crimes were committed before the enactment of the “Duro-fix”, the court was compelled to address two important questions: 1) whether the “Duro-fix” could apply retroactively and 2) whether the “Duro-fix” was a congressional delegation of authority or part of the tribe’s inherent sovereignty.¹⁶⁹

The court began by analyzing the legislative history of the “Duro-fix” amendments and acknowledged that Congress was acting to negate the effect of the rule espoused in *Duro*.¹⁷⁰ The court noted that, although Congress was attempting to negate *Duro*, it was attempting to do so by recognizing and affirming that tribes had always had the sovereign authority to try nonmember Indians.¹⁷¹ In looking at this the court stated “[w]hile Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret prior law.”¹⁷² And once the Supreme Court has interpreted the law, the court continued, the “Court’s decision is the correct statement of what the law always was, even if no

¹⁶⁴ See *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir. 1998).

¹⁶⁵ See *Means*, 154 F.3d at 942-43.

¹⁶⁶ See *id.* at 943.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 946-47.

¹⁷¹ See *Means*, 154 F.3d at 946.

¹⁷² *Id.*

one knew it until the Supreme Court so held.”¹⁷³ The result, the court reasoned, is that “regardless of Congress’ intent to declare that tribes *always* had the inherent authority to try non-member Indians, that simply cannot be what the amendments accomplished.”¹⁷⁴ Thus the problem was narrowed to a question of the scope of Congressional authority.

The court did not question Congress’ power to pass the “Duro-fix”, but it believed that the Congressional “Duro-fix” must be seen, in light of the holding in *Duro*, as an “affirmative delegation of power” that necessitated a retroactive applicability analysis.¹⁷⁵ The court then noted that Congress clearly evinced an intention to have the amendments apply retroactively, but that the retroactive application would be a violation of the constitutional prohibition against ex post facto laws.¹⁷⁶ The court reasoned that this would be the case, because under the *Duro* rule, Means would not have been subject to the punishment of two sovereigns.¹⁷⁷ Thus although the court uses language indicating that the amendments are a delegation of power, it also stated that under the “Duro-fix”, the tribe would be able to prosecute under its inherent authority and as such no double jeopardy problem would result. The ambiguous nature of the language, therefore, left the question open as to whether the court was interpreting the “Duro-fix” to be a true delegation of Congress’ jurisdiction or whether Congress was simply restoring the inherent sovereign authority of the tribe.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 947.

¹⁷⁶ *See id.* at 948.

¹⁷⁷ *See id.*

This question was subsequently addressed by the Ninth Circuit Court in *United States v. Enas*.¹⁷⁸ In *Enas* there was no question of retroactive application. Enas, a member of the San Carlos Apache Tribe, was charged by the White Mountain Apache Tribe for assault with a deadly weapon and assault with the intent to cause serious bodily injury.¹⁷⁹ He pled guilty and was later indicted by a federal grand jury.¹⁸⁰ On Enas' motion the district court dismissed the case reasoning that the *Means* case had established that tribes obtained their authority to prosecute as a delegation from Congress and thus tribes acted under the same sovereignty as the federal government.¹⁸¹ As such the federal government could not try Enas without violating the double jeopardy clause of the Constitution.¹⁸² A three-judge panel of the Ninth Circuit reversed the district court's grant and the full panel decided to hear the case to decide the impact of *Duro* on the circumstances of the case.¹⁸³

The Ninth Circuit noted that the question was one of sovereignty.¹⁸⁴ If the tribe "exercises inherent power, it flexes its own sovereign muscle, and the dual sovereignty exception to double jeopardy permits federal and tribal prosecutions for the same crime."¹⁸⁵ On the other hand, "when a tribe exercises power delegated to it by Congress, the Double Jeopardy Clause prohibits duplicative tribal and federal prosecutions."¹⁸⁶ The court then examined the

¹⁷⁸ 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied 534 U.S. 1115 (2002).

¹⁷⁹ See *Enas v. United States*, 255 F.3d 662, 665 (9th Cir. 2001) (en banc), cert. denied 534 U.S. 1115 (2002).

¹⁸⁰ See *Enas*, 255 F.3d at 665.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 666 ("Our task, then, is to determine whether the two entities that prosecuted Enas are 'separate sovereigns.'").

¹⁸⁵ *Id.* at 667.

¹⁸⁶ *Enas*, 255 F.3d at 667.

relationship between the *Duro* decision and the “Duro-fix” and noted that these decisions reflected a divergence between the two branches over the nature of tribal sovereignty.¹⁸⁷ As such, the majority stated, the question became one of separation of powers.¹⁸⁸ If the Supreme Court was interpreting the Constitution, the court stated, then Congress would be unable to alter the nature of tribal sovereignty without delegating its own sovereign authority to the tribes.¹⁸⁹ On the other hand, if the *Duro* decision was not based on the Constitution, but rather was simply an exposition of federal common law, then it was within the power of Congress to alter the nature of the federal common law and find that the tribes’ inherent sovereignty included the power to prosecute nonmember Indians.¹⁹⁰ The court explicitly rejected the Eighth Circuit’s finding that *Duro* had Constitutional dimensions.¹⁹¹ Instead the court held that the *Duro*, *Oliphant* and *Wheeler* decisions, based upon their use of historical analysis to find an implicit Congressional divestiture of tribal sovereignty, were “founded on federal common law.”¹⁹²

Since the prior Supreme Court decisions were based on the federal common law, the Ninth Circuit majority held that Congress could alter those decisions and redefine the nature of inherent tribal sovereignty.¹⁹³ This holding preserved the *Means* decision’s holding regarding the retroactivity of the “Duro-fix”, but overruled it to the extent that it may have implied that

¹⁸⁷ *See id.* at 670.

¹⁸⁸ *See id.*

¹⁸⁹ *See id.* at 673 (“When the issue is a constitutional one, the courts have the last word.”).

¹⁹⁰ *See id.*

¹⁹¹ *Enas*, 255 F.3d at 674 (“To hold, as did the Weaselhead panel majority, that this is a constitutional issue...ignores the glaring omission of constitutional discourse from *Duro*, *Oliphant* and *Wheeler*.” (citations omitted)).

¹⁹² *Id.* at 673.

¹⁹³ *See id.* at 675.

Congress lacked this power or that the delegation was one of federal sovereignty.¹⁹⁴ The Ninth Circuit concurrence agreed that the prior Supreme Court decisions were interpretations of federal common law and that Congress had final authority to decide what the common law was, but disagreed about the scope and nature of the Congressional power to declare the common law.¹⁹⁵

The concurrence felt that “Means...misinterpreted the effect of the 1990 ICRA (the “Duro-fix”) amendments on the sovereign power of the tribes.”¹⁹⁶ The concurrence noted that Congress has the power to authorize the states to enact legislation which would otherwise violate the commerce clause, but that in so acting, the “fact that Congress authorized the state legislation does not mean that when the state legislates, it acts as an arm of the federal government.”¹⁹⁷ The concurrence felt that Congress has the absolute power to add or subtract from tribal sovereignty and that any such addition was by definition part of the tribes’ inherent sovereignty.¹⁹⁸ The majority had rejected this view because they rejected the notion that Congress could define any power as inherent and by this circumvent the limitations imposed by the Constitution.¹⁹⁹ Thus in the end the Ninth Circuit unanimously held that Congress had the power, in this case, to redefine the inherent sovereignty of tribes without delegating the sovereignty of the federal government

¹⁹⁴ See *Enas*, 255 F.3d at 675, n.8.

¹⁹⁵ See *id.* at 675-83 (Pregerson, Trott, Tashima & Fletcher, concurring).

¹⁹⁶ *Enas*, 255 F.3d at 679.

¹⁹⁷ *Id.* at 680, n. 5.

¹⁹⁸ *Id.* at 680.

¹⁹⁹ The majority clarified this belief by stating “The concurrence would hold that a power never previously possessed by a tribe—not in 1787, not at the time of the tribe’s conquest, not at the time the tribe was first recognized by the federal government, and not today—could be bestowed upon the tribe tomorrow by Congress and still be termed “inherent.””. *Enas*, 255 F.3d at 670. Thus the majority would seemingly still limit Congress’ power to add to inherent tribal sovereignty based upon the historical record. As such the power must have existed at some point for Congress to be able to restore it and have it still be inherent. The problem is that this permits the Court to again circumscribe Congressional authority by selectively interpreting the historical record to find that Congress overstepped its authority in legislating the finding that the implicit divestiture of sovereign authority never occurred.

and thus creating double jeopardy concerns. The only dissention occurred in defining the scope of the power possessed by Congress.

2. *The “Duro-fix” in the Eighth Circuit: United States v. Weaselhead & United States v. Lara*

The Eighth Circuit’s interpretation of the interplay between *Duro*, the “Duro-fix” and tribal sovereignty was the exact opposite from that of the Ninth Circuit. In *United States v. Weaselhead*,²⁰⁰ the Eighth Circuit held that the prior *Duro* decision was one of constitutional dimensions and that as such, Congress could only restore criminal jurisdiction over nonmember Indians to the tribes by delegating its own sovereign authority.²⁰¹

In *Weaselhead*, the Eighth Circuit addressed the issue of whether a tribe prosecuting a nonmember Indian was acting under authority of its own inherent sovereignty or under a delegation of federal sovereign authority.²⁰² In the case, Weaselhead had pled guilty to a sexual assault charge brought by the tribe and was later indicted by a federal grand jury for the same conduct as well as additional sexual assault charges.²⁰³ Weaselhead pleaded not guilty and filed a motion to dismiss the count based on the conduct for which he was already punished by the tribe.²⁰⁴ He argued that this count violated the Double Jeopardy Clause of the Constitution.²⁰⁵

²⁰⁰ 156 F.3d 818 (8th Cir. 1998).

²⁰¹ See *United States v. Weaselhead*, 156 F.3d 818, 824 (8th Cir 1998).

²⁰² See *Weaselhead*, 156 F.3d at 819.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

The district court denied the motion and the case was appealed to a three judge panel of the Eighth Circuit.²⁰⁶

The panel court reduced the question to one of tribal sovereignty and whether the “Duro-fix” restored inherent sovereignty or was an affirmative delegation of congressional authority.²⁰⁷ Unlike the Ninth Circuit, the majority of the Eighth Circuit panel felt that the *Duro* opinion was not based upon federal common law but rather that it had constitutional implications.²⁰⁸ The court stated that this was the case because “all Indians are also full citizens of the United States, (and) such an intrusion necessarily implicates “constitutional limitations.””²⁰⁹ The further stated that “[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.”²¹⁰ The court further worried that Congress was attempting to “recast history in a manner that alters the Supreme Court’s stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government.”²¹¹ This was worrisome to the court because the affirmation of tribal jurisdiction would subject nonmembers to the criminal jurisdiction of tribes in violation of the basic tenet of American Jurisprudence that government was to be by the

²⁰⁶ See *id.* at 820.

²⁰⁷ See *id.* at 821.

²⁰⁸ See *Weaselhead*, 156 F.3d at 824.

²⁰⁹ *Id.* at 822.

²¹⁰ *Id.*

²¹¹ *Id.* at 823.

consent of the governed.²¹² The court concluded by asserting that the “ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress’ authority.”²¹³

The decision by the panel was reheard by the Eighth Circuit sitting *en banc*.²¹⁴ The court then vacated the panel decision and affirmed the district court’s holding that *Duro* was not an interpretation of constitutional principles.²¹⁵ As a result the Eighth Circuit, sitting *en banc*, was compelled to revisit the issues addressed by the courts in the two *Weaselhead* cases in *United States v. Lara*.²¹⁶

Lara involved a similar situation to that found in *Weaselhead*. Lara was arrested by officers of the Spirit Lake Nation for various offenses to which he pleaded guilty.²¹⁷ Thereafter, a federal grand jury indicted Lara for offenses arising from the same conduct.²¹⁸ Lara filed a motion to dismiss on double jeopardy grounds but was denied.²¹⁹ A panel of the Eighth Circuit affirmed the district court but the entire Eighth Circuit decided to rehear the appeal *en banc*.²²⁰ The full circuit adopted the reasoning of the majority panel in the *Weaselhead* decision issued by

²¹² *Id.* at 822. The majority apparently misses the irony of using an argument based upon the consent of the governed while speaking of the involuntary incorporation of tribes into ‘our constitutional system’ that necessarily deprived them of their sovereign right to punish crimes committed within their territory.

²¹³ *Id.* at 824.

²¹⁴ See *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir 1999) (*En Banc*).

²¹⁵ See *Weaselhead*, 165 F.3d 1209.

²¹⁶ 324 F.3d 635 (8th Cir. 2003) (*En Banc*).

²¹⁷ See *United States v. Lara*, 324 F.3d 635, 636 (8th Cir. 2003) (*En Banc*).

²¹⁸ See *Lara*, 324 F.3d at 636.

²¹⁹ See *id.* at 636-37.

²²⁰ See *id.* at 636.

the panel.²²¹ The court held that the nature of tribal sovereignty had constitutional implications and that “[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress’ power.”²²² Thus the Eighth Circuit in *Lara*, over a vociferous dissent, came to the exact opposite result of the full Ninth Circuit in *Enas*. In order to settle the split, the Supreme Court granted a writ of certiorari in *Lara*.²²³

III. THE CONGRESSIONAL POWER TO RESTORE TRIBAL SOVEREIGNTY

The effect of Congressional action, whether actual or implied by the Court, upon tribal sovereignty depends upon two factors: the nature of tribal sovereignty and the Constitutional limits placed upon tribal sovereignty. Because of the nature of sovereignty, it cannot be lost or destroyed by the unilateral action of one sovereign against another. Likewise, the Constitution places no limits upon tribal sovereignty, as such all modern limitations upon tribal sovereignty are the result of Congressional acts or executive actions that either explicitly or implicitly, through judicial interpretations, fetter the tribal nations’ ability to exercise full sovereignty. Because the Constitution is silent as to the exact nature of the federal government’s power to deal with tribal nations, Congressional legislation regarding tribal nations and the interpretations proffered by the Supreme Court are necessarily part of the federal common law and Congress is supreme when it comes to stating what the common law is.

²²¹ See *id.* at 639.

²²² *Lara*, 324 F.3d at 638. Even if one were to accept the logic of this statement, it completely ignores the fact that Congress never explicitly removed tribal jurisdiction.

²²³ See *United States v. Lara*, 124 S. Ct. 46 (2003).

A. The Nature of Sovereignty

One of the overriding questions presented in the cases addressing the interplay of *Duro v. Reina*²²⁴ and the “Duro-fix” is the nature of Congress’ power to restore sovereignty that has been lost.²²⁵ The Court in *Duro* clearly held that the tribes had lost their sovereign power to exercise criminal jurisdiction over nonmember Indians.²²⁶ Whether this holding was correct or in adherence with previous precedent is irrelevant. As was noted by the court in *Enas*, once the Court decided that it had been lost, then it must be treated as having been divested by Congress.²²⁷ But this leaves open the question of what such a divestment means and the meaning of such a divestment in turn depends upon the general nature of sovereignty.

Although the court in *Weaselhead* pointed it out as a reason to justify preventing the tribe from exercising its jurisdiction, sovereignty in American jurisprudence has been traditionally derived from the consent of the governed.²²⁸ It is this consent that gives legitimacy to the government and enables it to exercise the full powers associated with sovereignty. Once sovereignty has been conferred by the governed, it seems logical that it cannot be expanded or destroyed without the consent of the very governed who first granted it. If it were possible to

²²⁴ *Duro v. Reina*, 495 U.S. 676 (1989).

²²⁵ *See supra*, Section II.

²²⁶ *See Duro*, 495 U.S. 676.

²²⁷ *See United States v. Means*, 154 F.3d 941, 946 (9th Cir. 1998). There court explained that, While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law. In other words, once the Supreme Court has ruled that the law is “X,” Congress can come back and say, “no, the law is ‘Y,’” but it cannot say that the law was *never* “X” or *always* “Y.” The Court’s decision is the correct statement of what the law always was, even if no one knew it until the Supreme Court so held.

Id. (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994).

²²⁸ *See United States v. Weaselhead*, 156 F.3d 818, 822 (8th Cir. 1998).

expand or destroy sovereignty without the consent of the governed, then there would be no need for their consent in the first instance.

Yet this is precisely the result declared by the court in *Lara*.²²⁹ The court stated that “[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress’ power.”²³⁰ But this logic is flawed. Because sovereignty is a grant from the governed it cannot be altered by an outside force. The third party restrain another’s sovereignty by agreements in the form of treaties or constitutions or through brute force as in the case of an occupying power, but it is never destroyed by these actions. In such a case, the sovereignty is simply fettered by the agreement or through the power of the occupying force. If those restraints are later removed, the sovereignty will be seen to exist to the same extent that it did when first bestowed by the consent of the governed. This is precisely the point made by the concurrence in *Enas* when it noted that the states delegated (i.e. gave up by agreement) their sovereign power over interstate commerce to the federal government, but that this did not mean that the states act as an arm of the federal government when Congress restores their right to regulate in this area.²³¹ Instead, once the limits placed upon their sovereignty are removed by Congressional legislation, the states are considered to act under their own inherent authority.²³²

²²⁹ See *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (*En Banc*).

²³⁰ See *Lara*, 324 F.3d at 639.

²³¹ See *United States v. Enas*, 255 F.3d 662, 680 n.5 (9th Cir. 2001) (*En Banc*). See also *supra* note 197 and accompanying text.

²³² See *Enas*, 255 F.3d at 680 n.5.

In this sense, Congress is incapable of truly divesting any nation, whether a Native American Nation or a foreign nation, of its sovereignty. Only the governed can withdraw their consent and with it the legitimate sovereign power. Congress and the executive, however, through its foreign relations powers, may choose to recognize a sovereign nation hitherto not recognized.²³³ Likewise they may also utilize the war powers to suppress the sovereignty of a foreign or domestic nation. This may be done in innumerable ways ranging from refusing to recognize a sovereign, to legislating limits upon the sovereign (whether effectual or otherwise), by negotiating limitations (as with the Constitution or via treaties), or by conquering the sovereign and repressing its populace. In any event the full sovereignty still exists in spite of the Congressional action; it is simply impaired while the Congressional action is still enforced.²³⁴ Whether the federal government chooses to so act is a question of policy and should remain with the branches assigned the task of generating and carrying out policy.

Since the Constitution governs the relationships between the founding states and the federal government and was not consented to by any tribal nation, it does not directly affect the

²³³ In *Cherokee Nation*, Justice Johnson argued that the Cherokee were not a foreign nation because they had not been recognized as such, but that the Executive clearly had the power to recognize the Cherokee. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 26 (1831) (“I have before remarked that, until expressly recognized by the executive under that form of government, we cannot recognize any change in their (the Cherokee’s) form of existence. Others have a right to be consulted on the admission of new states into the national family.”).

²³⁴ This very point was made in the United States’ brief submitted to the Supreme Court for *Lara*. See Brief for the United States at 33, *United States v. Lara*, 124 S. Ct. 46 (2003) (No. 03-107); 2003 WL 22811829 (2003). The brief points out that at one time the United States divested the Philippines of its sovereignty and treated it as a territory, but that it later restored sovereignty to the Philippines via statute. If sovereignty can be destroyed, then one gets the absurd result that Congress must have delegated its own sovereignty to the Philippine nation to effect this change. This would also be true of the numerous other nations and states that have been conquered by the United States. During the civil war, the United States brutally conquered and subjugated the state of Georgia, occupying it for a period of time. Under the logic of divested sovereignty, one could argue that the state of Georgia must have been restored via a delegation of federal sovereignty and thus must be an arm of the federal branch with full double jeopardy implications.

nature of any tribe's sovereignty. Tribal sovereignty can only be affected by the Constitutional provisions that grant the federal government the power to affect sovereigns through direct action. Thus the true question presented by the interplay of *Duro* and the "Duro-fix" is to what extent the constitution restrains Congress' power to legislate policy regarding the sovereignty of foreign and domestic nations and what is the role of the Supreme Court in enforcing those limits.

B. The Constitution and Sovereignty

The Constitution clearly restrains Congress from interfering with the sovereignty of the domestic sovereigns (i.e. states) that make up the United States. This is accomplished by enumerating the specific powers that are vested in the federal government and preserving the remainder for the states or the people.²³⁵ The Constitution also clearly indicates that the federal government shall have all of the sovereign powers necessary for it to effect policy toward foreign sovereigns.²³⁶ Thus Congress has the absolute right to recognize or refuse to recognize a foreign sovereign, to invade and conquer a foreign sovereign, or to relinquish control of a foreign sovereign and thus permit it to govern itself again. The states are likewise restrained from legislating their own policy towards foreign sovereigns.²³⁷ However, the Constitution gives no clear indication as to the limitations imposed on Congress' power to legislate policy with regards to tribal sovereignty.²³⁸

²³⁵ See U.S. CONST. amend. X.

²³⁶ See *supra*, note 81.

²³⁷ See U.S. CONST. art. I, § 10.

²³⁸ The only pertinent reference would be the Indian Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.

The fact that the Constitution does not clearly delineate the limits imposed upon Congress' ability to modify the sovereign to sovereign relationship with native tribes does not mean that there are no limits whatsoever on Congress' authority.²³⁹ But those limits must be based on something more than the belief that once Congress has acted, implicitly or explicitly, to reduce tribal sovereignty, that it may not retract its earlier action and pursue a new policy. To do so would place Congress in the untenable position of having its policy options frozen by the Supreme Court on principles not founded upon the text of the Constitution. When coupled with the Court's power to interpret Congressional action as divesting tribes of their sovereignty, this essentially transforms the Supreme Court into the de facto tribal policy making body. This is a role that the Constitution clearly does not evince for the Court.

Because the constitution leaves the question open, the better reasoned approach, and the approach which recognizes the immutable nature of sovereignty, is that taken by the Ninth Circuit Court of Appeals in *Enas*.²⁴⁰ The *Enas* court correctly held that the Congressional policy toward tribal sovereignty is one of federal common law.²⁴¹ And when the federal common law is

²³⁹ Even supposing that the Indian Commerce Clause grants the federal government plenary power to deal with tribes, the federal actions may be limited by the application of Supreme Court interpretations of Constitutional limits based upon federalist principles, see *supra* Section I. B. 2. , or based upon other applicable sections of the Constitution such as the Fifth Amendment prohibition against the uncompensated taking of tribal property. Further limitations may be imposed by the nature of the dual-citizenship held by tribal members.

²⁴⁰ See *United States v. Enas*, 255 F.3d 662, 673-75 (9th Cir. 2001) (*En Banc*). The majority approach recognizes that original inherent sovereignty is unchanged, but does limit the ability of Congress to say what was original inherent sovereignty. *Id.* Of course it is unclear who would determine what type of sovereignty the tribes originally possessed. The concurrence is probably a better fit with the plenary doctrine in that it asserts that Congress can alter the nature of tribal sovereignty at will and it is irrelevant whether the sovereignty was part of the tribe's original sovereignty. See *id.* at 675-83.

²⁴¹ See *Enas*, 255 F.3d at 673 ("Duro is not a constitutional decision but rather, like *Oliphant* and *Wheeler*, a decision founded on federal common law.").

in question, Congress' interpretation reigns supreme.²⁴² In contrast, the Eighth Circuit reasoning relied upon weak references to the "ascertainment of first principles" and decisions with "constitutional limitations" without being able to find direct support in the Constitution.²⁴³ In addition, the Eighth Circuit completely ignored the nature of the analysis in the prior Supreme Court precedent to come to the conclusion that the *Duro* decision was constitutional in nature.²⁴⁴

Although the *en banc* decision in *Enas* was unanimous, there were two very different theories regarding the nature of Congress' power to alter tribal sovereignty.

The majority of the court felt that Congress had the power to restore tribal sovereignty, but that it could not vest the tribe with more sovereignty than it originally possessed.²⁴⁵ But this reasoning seems to imply that tribes may have had less than full sovereignty at some point and thus ignores the immutable nature of sovereignty. Likewise, it leaves open the possibility that the Court will simply assert the right to define the limits of tribal sovereignty based upon its peculiar reading of the historical record. The end result is a return to the activism of the Rehnquist Court in a different guise. The concurrence avoids this problem by placing the power squarely in the hands of Congress.

The concurrence recognizes the immutable nature of sovereignty by noting that Congress can recognize tribal sovereignty in any amount and at any time and that this sovereignty is then

²⁴² See *id.* at 675 (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)).

²⁴³ See *supra* notes 209 & 213 and accompanying text.

²⁴⁴ The Ninth Circuit in *Enas* noted that the Eighth Circuit "ignores the glaring omission of constitutional discourse from *Duro*, *Oliphant* and *Wheeler*." See *Enas*, 255 F.3d at 674. The court further notes that, "[i]t would be extraordinary indeed if those were constitutional decisions that simply neglected to mention the Constitution. If there is a constitutional dimension to those decisions, we cannot divine it from the language of the opinions." See *id.*

²⁴⁵ See *id.* at 670.

inherent.²⁴⁶ The concurrence employs the metaphor of a vessel that Congress can fill or drain at its pleasure,²⁴⁷ but this implies that Congress has the power to create and or destroy sovereignty. The sovereignty possessed by tribes is complete unto itself and is not a vessel that can be filled or drained at the pleasure of Congress. The sovereignty exists fully and completely and Congress can only use its power to prevent or permit its exercise. But the effect of the concurrences approach is the same: Congress can permit the tribal governments to exercise their full sovereignty or some intermediate measure and this will still be inherent sovereignty.

The *Enas* approach, both the majority and the concurrence, recognizes the power of the federal government to affect the sovereignty of tribes. In addition, it recognizes the proper role of the Supreme Court in interpreting Congressional action without placing the Supreme Court in the position of final arbiter of federal Indian policy. This is accomplished by placing federal Indian policy into the realm of federal common law, where the Court can interpret to arrive at intermediate solutions to controversies, but where Congress has the final word.

Until the nation realizes the value of partnering with tribal nations and fully incorporates the tribes into the federalist system, the approaches employed by the *Enas* court will at least serve to preserve the tribes from judicial restraints upon their sovereignty.

²⁴⁶ See *id.* at 680-81.

²⁴⁷ See *id.*

CONCLUSION

With the looming threat of international terrorism, America needs more allies in the struggle to secure our homeland. Tribal nations have the potential to be effective allies in the struggle against terrorism. Tribal nations are in the best position to fashion laws to ensure the security of their territory and enable their citizens to meet the challenges of terrorism. Unfortunately, the Court has consistently furthered a policy of limiting tribal sovereignty in spite of Congressional policies favoring tribal sovereignty. This problem can only be addressed by a policy which reaffirms and recognizes the inherent sovereignty of tribal nations. This is precisely what Congress did when it overruled *Duro v. Reina*. However, it remains to be seen if the Court will reverse the trend disfavoring tribal sovereignty by adhering to the division of powers found in the Constitution.

The Constitution exclusively vests the power to deal with Indian tribes in the Congress of the United States. Because this power rests solely with Congress and not the Supreme Court, the Court can only interpret the actions of Congress to determine whether and to what degree tribal sovereignty has been restrained. This interpretation of Congressional action constitutes an interpretation of federal common law which Congress is free to alter through legislative pronouncements of what the law really is. Thus in the case of the “Duro-fix”, Congress was free to alter the law so as to negate the effect of *Duro*. Since sovereignty cannot be destroyed, Congress is likewise free to unfetter tribal sovereignty without fear that such action will constitute a delegation of Congressional sovereignty. As such, the prosecution of Lara by both

the tribe and the federal government does not violate the Double Jeopardy Clause of the Constitution of the United States.